

1 Now, that committee made a recommendation of
2 approval, and they actually did approve, and they had the right
3 to approve it.

4 On the other hand, there was as part of that
5 ordinance a right by members of the City Council to call for a
6 review by the full City Council.

7 Now, that was never done.

8 And one -- the issue, procedurally, now is once the
9 allegations of fraud were raised -- and I'm going to talk about
10 the timing of those newspaper articles were raised -- the mayor
11 and the City Council under their authority to investigate in
12 their ordinances decided that they wanted to call up this
13 matter for review by the City Council.

14 And their decision was -- and this is what Mr. Wilson
15 is complaining about as his injury -- the decision was that
16 they had a temporary occupancy permit, but they would not be
17 allowed to open pending a result of the investigation of the
18 fraud allegations and advice from independent counsel as to the
19 facts, the findings, and their relevance under Aurora law, and
20 then they would make a decision on whether to allow a late
21 appeal of that development -- they could take that procedural
22 posture, I suppose, based on the fraud, just like a
23 misstatement in a court proceeding can be used to reopen
24 something where ordinarily you wouldn't be able to -- or some
25 other procedural decision regarding what they find and what

1 their options are based on the advice they get and what they
2 decide to do.

3 THE COURT: And that hearing was open to the public?

4 MR. MALINA: Yes. The decision was made as part of a
5 public meeting that was held. The initial decision was made as
6 part of a public meeting held on August 28th of 2007, this past
7 August 28th.

8 And then -- counsel is correct -- there has been some
9 shifting around because of allegations of connections to the
10 City, which the City would like to avoid. It would like to get
11 an analysis without that.

12 And so there was an individual appointed. I was
13 asked for names of people that, you know, could do a review. I
14 gave a list of four or five originally.

15 Originally the City chose Dick Martens, and there
16 were some objections from I think a couple alderman, because
17 they had been informed that Dick Martens was a law clerk for us
18 40 years ago. Never worked as an associate, but was employed
19 as a law clerk 40 years ago, and rents an office in our suite.
20 And those allegations are true.

21 And the mayor made the initial appointment on his
22 own. But what we said, when the decision was reached on August
23 28th is: "I have made this decision, and I have circulated the
24 biography of Mr. Martens to the City Council members, and I
25 believe he is qualified to do the investigation. But if the

1 Council members object, it's not anything set in stone. If the
2 Council members would prefer someone else, we could that. I
3 only ask that it be someone with no ties to the City: who
4 hasn't done work for the City, who hasn't made money off the
5 City."

6 Because his view -- and this was concurred in by the
7 Council members -- is that that would be a better way to get
8 the determination of the significance of these issues, and then
9 to act on them in a way that, the City hopes, ultimately
10 satisfies more people than would otherwise be the case; they
11 took careful steps to make sure of what the ramifications are
12 of how Planned Parenthood went through this permitting process.

13 THE COURT: So rather than conduct an extensive
14 internal investigation, you decided to go outside to find an
15 independent person who would report to the mayor and the
16 Council.

17 MR. MALINA: Correct. Looking at the records of the
18 City, some of the minutes of a meeting that I'm going to talk
19 about in a little bit.

20 The existing law, both zoning laws of the City of
21 Aurora on the PDD ordinances that are involved, which
22 ultimately are involved, and also the existing laws of the
23 United States as determined by the Supreme Court as it relates
24 to abortion rights, and how those are going to affect what the
25 City's options are, depending on what it finds actually

1 occurred and what its significance is.

2 So have I answered your question?

3 THE COURT: Yes.

4 MR. MALINA: All right. Back to my e-mail.

5 Counsel said that an alderman in this e-mail has said
6 that he wouldn't allow this facility to open unless ordered to
7 by a Court.

8 I suggest, Judge, that isn't what he says here at
9 all. And what he says --

10 THE COURT: Read it, please.

11 MR. MALINA: I will.

12 "I am pro-life." This is an excerpt. "I will also
13 abide by the law of the land, as I am sworn to do" -- not as
14 ordered to by a Court -- "as I am sworn to do as an elected
15 official." Those were my words. "I will not go along with it,
16 though, until the law says I must." Not a Court, the law.

17 "I will also never think positively about a medical
18 practice that will perform abortions on minors without parental
19 consent, regardless of their extremist ideas of why they should
20 be allowed to."

21 So what we are expressing is -- and this is that --

22 THE COURT: Have you completed what he wrote?

23 MR. MALINA: I have.

24 THE COURT: You have?

25 MR. MALINA: I'm sorry?

1 THE COURT: Have you completed what he said?

2 MR. MALINA: No. I could read the whole e-mail.

3 THE COURT: The point is to get a better
4 understanding of it, you should read the whole thing.

5 MR. MALINA: Okay. Well, what it is, Judge, it is a
6 personal e-mail responding to an individual, and he's writing
7 to someone named Melissa.

8 "Since you decided to make your email widely public,
9 I did too. I gave you a perspective on the issue that I felt
10 you should know. I think Planned Parenthood and its leaders
11 are widely deceptive to the governments of communities all
12 around the United States.

13 "I do not like the fact that they took the ability to
14 plan out of our hands with their deception. I can't imagine
15 that even a pro-Planned Parenthood person could see that the
16 long-term effects of their location are not good for my
17 neighborhood.

18 "You touched on my morality. I have never been a
19 pro-life activist, but I am pro-life. I do believe life begins
20 at conception. Why else would people put ultrasounds on their
21 refrigerator?

22 "Even though I am elected, I come to the office with
23 life experiences that lead me one way or another.

24 "I am pro-life. I will also abide by the law of the
25 land as I am sworn to do" and then completed as I had already

1 quoted.

2 THE COURT: Yes.

3 MR. MALINA: Judge, my position is, this statement is
4 nothing other than what judges do every day. They make
5 decisions. Their personal views on whether a law was wisely
6 passed or was a good idea or good for the public, they have
7 personal views.

8 They are people, like anyone else. But they apply
9 the law, and they do it in a manner that may go against their
10 personal views, but they follow the law.

11 It's akin to what a prosecutor does when he sees a
12 case before him with evidence, feels that the crime was
13 committed and that the individual he is looking at committed
14 the crime, but there is not sufficient evidence to bring a
15 prosecution.

16 He declines the prosecution, subjectively believing
17 that the person is guilty of the crime and that a crime will go
18 unpunished.

19 But his job is to apply and make charges only where
20 they are appropriate and where they will be supported by a
21 good-faith basis to get a conviction.

22 This is what people do every day. And this is what
23 elected officials do. This elected official is simply saying:
24 "I don't like this here, but I'm going to follow the law."

25 That's all. And he is entitled to do that.

1 And no inference that he is going to -- see, part of
2 the problem here, Judge, is he hasn't voted against it yet.
3 They are drawing that conclusion. No decision has been made.

4 They are being delayed pending the investigation, and
5 that investigation has to do with fraud, and it's clear -- I'll
6 get to more support for that in a minute.

7 Judge, I was going to go in next to the process here,
8 and I have already articulated it. The -- Dick Martens was
9 originally selected there was a complaint by a couple of
10 aldermen feeling there could be bias or a perception of bias.
11 And then Phillip Luetkehans as selected by -- what happened is
12 that the two aldermen at large, who also happened to be
13 attorneys -- one a long-standing member, and the other who ran
14 against the current mayor in the last mayoral campaign -- were
15 chosen to go find somebody.

16 And Phillip Luetkehans was selected, and then there
17 was information that Richard Irvin, the alderman who had run
18 against Mayor Weisner in the last election and lost that
19 election, had received a campaign contribution from Phillip
20 Luktahans.

21 So then the City Council had to deal with issue,
22 okay, once it was discovered, and they chose to ask John
23 Barsanti to look at -- and what's going to happen is Barsanti
24 is going to get both reports, the Martens' report and the
25 Luetkehans' report, which should be done within -- by the end

1 of the week.

2 Martens is already completed, and I believe is at
3 Barsanti's office, and he is going to give direction to the
4 City Council on what he believes the relevance of the various
5 facts are, and their significance to the zoning laws of the
6 City of Aurora and the State of Illinois.

7 That's where we are. And he has indicated that he
8 will complete that process and give his recommendation within
9 seven days, and the City Council will conduct a special
10 meeting, or, if a regular meeting is imminent, can make a
11 decision on this one way or the other.

12 So that's what we have here.

13 THE COURT: Is it your understanding, as a matter of
14 generally practice, that the State's Attorneys are advisors to
15 county boards?

16 MR. MALINA: I do.

17 THE COURT: But it is not certainly your position
18 that a State's Attorney is an advisor to local communities, is
19 that right?

20 MR. MALINA: I don't know of any provision under
21 state law that gives him that duty. I told you exactly what
22 the situation is: He has been asked and has agreed.

23 That's the situation.

24 THE COURT: You may proceed with your argument.

25 MR. MALINA: And this decision, Judge, I want to talk

001500

1 about a little bit.

2 Well, I already talked about the planned district
3 development. It's an involved process, and this is a process,
4 again, where you didn't just file for a building permit. You
5 had to appear before a City Committee and answer questions
6 about what you are proposing. And counsel has alluded to that.

7 And, Judge, the key here is the allegations were
8 raised of fraud. And it's one thing to go under an assumed or
9 to use another corporate entity that's related.

10 That's something that's reasonably common, although
11 in the papers that they filed there is this constant reference
12 to "tenant unknown" which ties into what I'm about to quote to
13 you.

14 Indeed, this is part of the record, in the minutes
15 meeting from November of 2006, Alderman Elmoore.

16 THE COURT: November 16th, 2006?

17 MR. MALINA: Yes.

18 Alderman Elmoore, who is one of those sitting
19 aldermen and on this Committee along with Alderman Saville, he
20 asked the question: "Is this building being built for,
21 specifically for a client?

22 "Unidentified Gentleman: We are in negotiations with
23 a tenant. We do not currently have a lease, but we still want
24 to move ahead."

25 Now, Judge, here is the situation:

1 If you file your paperwork and you are using an
2 assumed corporate, or using an affiliate, a corporate affiliate
3 -- and there is no ban on that; in other words, there is
4 nothing in the permitting process that would require you to
5 list all other corporate affiliations" -- okay. You are just
6 kind of lying low.

7 But once you are at a hearing -- and this is a
8 hearing, this isn't just stuff before the Building Committee --
9 they had to be at a public meeting and answer questions.

10 This is a concern to the City because the City
11 expects honest answers to questions given to people who want to
12 develop in their City. It's critical. Is it material? That's
13 one of the things that the City is investigating.

14 But regardless of that Judge, it is critical, and
15 this is not a thing that regardless of whether the developer
16 performs abortions or whether he is building a Jewel that the
17 City wants to see in answer to its questions.

18 If the answer to the question, Judge, was: "We can't
19 disclose it at this time," that would have been an honest
20 answer.

21 Maybe somebody then would have thought, hum, maybe we
22 should check out the public records and see what they say about
23 the affiliations.

24 And then what would have happened, Judge? Well,
25 then, the cat would have been out of the bag, as they say.

1 Planned Parenthood would have been out there, which
2 apparently they have no problem with, they say it's no big
3 deal.

4 And then what would have happened? Well, the City
5 months and months and months ago would have been on notice and
6 could have looked into the very issues that it's concerned
7 about now: location, size of the facility, and they would have
8 done an internal review.

9 And it would have come out however it came out. And
10 maybe their plans would have been delayed for three or four
11 weeks, and they would have had no cause to come in here.

12 The City routinely looks into things. It takes a
13 while to turn around documents, and internally takes longer to
14 reach a decision of something raised: What are our
15 obligations? Do we have a say in this?

16 Things like that could have been discussed. But the
17 City was deprived of the opportunity of that, and it only came
18 up at the 11th hour.

19 And so the delay that Planned Parenthood is talking
20 about is its own fault for playing this -- for playing this
21 game.

22 THE COURT: May I take you back to the meeting?

23 It's the Planning and Development Committee minutes
24 of November 16.

25 So that comment -- or that question and that answer

1 is contained within the minutes, and this appears to have been
2 transcribed by a court reporter. So these are the official
3 records of Aurora, and that these statements were, indeed, made
4 on November 16th, 2006.

5 MR. MALINA: That's correct. The affidavit of
6 corporation counsel does certify that.

7 THE COURT: The -- but looking at the transcription,
8 the question is: "Alderman Elmoore: Is this building being
9 built specifically for a client?" That's the question.

10 Then the transcript is: "Unidentified Gentleman:"
11 Unidentified Gentleman says: "We're in negotiations with a
12 tenant. We do not currently have a lease, but we still want to
13 move ahead."

14 Who is the Unidentified Gentleman?

15 MR. MALINA: Judge, the reason for that is because
16 the transcription came later. This was a taped meeting, and
17 then a court reporter transcribed from the tape. And it was
18 unclear who the gentleman was.

19 THE COURT: These tapes are in the news nowadays.

20 MR. MALINA: The Open-Meetings Act type tapes or --

21 THE COURT: Tapes are in the news nowadays.

22 MR. MALINA: Oh, yes.

23 Proceed.

24 MR. MALINA: That's true.

25 And there is one other section here later where

1 Alderman Elmoore says -- and, again, they are talking about
2 various things, about access to the site -- Alderman Elmoore
3 says: "It's a nice buffer between them and the retail center"
4 -- meaning the residential -- "and these usually are pretty
5 quiet because they usually function in the daytime and that
6 makes it nice. I'd be interested to know who your client is
7 when you can release that."

8 It is clear that the City would have liked an answer
9 to its question.

10 THE COURT: In terms of who that person was or was
11 not, according to the minutes, it says "Others Present: Tom
12 Lehman, Gemini Office Development."

13 MR. MALINA: Right.

14 THE COURT: Is the inference that he is the
15 unidentified gentleman?

16 MR. MALINA: Yes.

17 THE COURT: At least that's your position?

18 MR. MALINA: Yes.

19 THE COURT: All right. Go on with your argument.

20 MR. MALINA: Let me just get my bearings here.

21 THE COURT: Okay. So the question was put and there
22 was an answer.

23 MR. MALINA: Yes.

24 And, Judge, the point here is that these statements
25 -- this was what was presented as part of the allegations of

1 fraud. And now I want to go back to these newspaper articles,
2 Judge, because they don't suggest what counsel suggests they
3 do.

4 If you go to the July 27th Tribune article, Judge --

5 THE COURT: Just a minute. Now, what exhibit number
6 was that, counsel?

7 MR. MALINA: 4.

8 THE COURT: Number 4.

9 You may proceed.

10 MR. MALINA: It is clear from the article that
11 Planned Parenthood is now going to be part of this site, and
12 that it is clear that they decided to the lay low because they,
13 quote Steve Trombley's statement that "He was surprised they
14 were able keep it a secret for so long." Okay.

15 So we know that. And then, counsel says, and the
16 City took no action at that time. Okay.

17 Now we go to August 9th. You have anti-abortion
18 demonstrators are on the site today. And this report is about
19 that. There are quotations from a pastor at a church saying:
20 "We are pro-life, and we want to let them know we are upset
21 with this."

22 And -- and this is important, I think -- "that they
23 expected that the facility would open." In other words, that
24 it would open because -- just because the facility provides
25 abortions would not stop it from going in.

1. And then Mr. Wilson argued, "and the City took no
2 further action."

3 His inference he wants you to draw is, we knew about
4 it, and only did it after the protests. Okay. That's what he
5 wants you to draw.

6 It's exactly the opposite, because you have to
7 remember, what was new that was disclosed when the protests
8 came forward: It was the allegations of fraud.

9 These articles do not indicate any of the minute
10 statements by people by Planned Parenthood or its
11 representatives. Somebody did some digging after that and came
12 up with, using the permitting process, concerns about that.

13 The City officials heard those concerns. They are
14 concerned about their zoning code. They care about their land
15 use.

16 These are serious allegations and there was some
17 backup to them. And it was then and only then that they
18 decided to investigate and put Gemini-Planned Parenthood on
19 hold.

20 So the very issuance of that temporary occupancy
21 permit disproves Mr. Wilson's case and his argument: They
22 issued it knowing an abortion -- knowing abortions were going
23 to be performed there.

24 When did it change? What was the new information?

25 The substantiated allegations of misstatements and

1 fraud in the permitting process.

2 Judge, this record is crystal clear: the City of
3 Aurora's officials are doing nothing against the Constitution
4 of the United States of America. The City of Aurora is abiding
5 by the protesters' First Amendment rights to be out there in
6 protest.

7 The City of Aurora is abiding by the law of the land
8 in Roe versus Wade.

9 This case is about the land use process, and how --
10 an allegation that it was misused by a developer.

11 If any other developer did this, they would be
12 investigated and they would be held up. And there is nothing
13 that suggests that some developer who did this was not
14 subjected to any investigation or slowed closure.

15 Now, I will admit, Judge, that if any developer who
16 was putting in a retail and had, perhaps, lied as part of the
17 permitting process and someone complained about that, probably
18 wouldn't have been assigned out to an independent
19 investigation.

20 Maybe it could have been done a little quicker, maybe
21 without, you know, the problems that we've had, but that's not
22 animus to abortion.

23 It is raised because of the political volatility of
24 the whole issue, and it has nothing whatever to do with animus
25 against the United States Supreme Court's decisions.

1 And I respectfully ask you to deny this motion. I
2 don't believe it's well-taken. I don't believe the issue is
3 ripe. And I don't believe there is any likelihood of success
4 on the merits, as it relates to this decision to conduct the
5 investigation and to hold them up pending the outcome.

6 And I thank you for your time. If you have any
7 questions, I --

8 THE COURT: I think I have been asking them along the
9 way, along with observations.

10 MR. MALINA: Thank you.

11 THE COURT: Counsel.

12 MR. WILSON: Your Honor, Chris Wilson for Planned
13 Parenthood.

14 If I could just respond?

15 THE COURT: It doesn't have to be quick. Take all
16 the time you need.

17 MR. WILSON: Thanks.

18 All of these allegations from counsel for the City of
19 Aurora seem to revolve around this question of fraud.

20 We spent a lot of time this morning trying to
21 explain, we were quiet but we weren't fraudulent.

22 But if there was fraud involved, or if there was
23 deceit, or somehow something wrong, let's find out about it.
24 Let's get citations, let's get some allegations.

25 But, in the meantime, let us open for business.

1 There is no allegation that the people of Aurora will be harmed
2 by us opening and providing medical services. It just makes no
3 sense.

4 What happened here was the political process demanded
5 that we get shut down, and they found a reason to shut us down.
6 That's all.

7 What was absolutely clear was that a medical health
8 facility was being opened in the City of Aurora.

9 Now, the fact that they provide abortion services as
10 part of the -- less than 10 percent of their services are
11 abortion services, and as part of all of their services that
12 they provide that that's is a component part, is really
13 irrelevant to the analysis.

14 Manchester, the case we presented, Planned Parenthood
15 versus Manchester, in which the Court observed they could not
16 deny variance -- a variance -- based on the fact that abortion
17 services were being provided, is absolutely on point here.

18 And they looked at the specific example.

19 In that case, 24 Pennicoat Street, LLC, was the
20 developer, just like Gemini is the developer.

21 Only later was it disclosed that Planned Parenthood
22 was going to be the tenant of the building. And just like here
23 there was hew and cry: How we were misled. How did this come
24 about?

25 And just like here, the Court held that is

1 irrelevant.

2 If it was an eyecare clinic, if it was a dermatology
3 clinic, if it was a footcare clinic, we would not be here.
4 It's the fact that we are providing abortion services that we
5 are getting all of this microscope treatment.

6 And, I think, running through what I heard counsel
7 say, things like: Well, the law isn't clear. We would have
8 determined what our obligations were. We would have sought --
9 found out whether there was anything we could do about this.

10 That shows you what the thinking is: If we had known
11 you were an abortion clinic in November of 2006, we might have
12 been clever enough to find a way to discriminate against you,
13 but you denied us that opportunity.

14 And that's exactly what the Court said in Manchester,
15 which is, this is a red herring of an issue. It's irrelevant.

16 The fact that it's abortion services does not justify
17 all of this special treatment. That's all we're getting, your
18 Honor: special treatment, discriminatory treatment, treatment
19 that interferes with our constitutionally protected rights.

20 They knew about those rights when they allowed us to
21 open. They allowed us to open on August 16th. They knew we
22 were providing services that included abortion services, and
23 that is the absolutely crystal clear point here: The law can't
24 allow them to place obstacles in the path of people seeking
25 abortion, reproductive and contraceptive services.

001511

1 And that is what they are doing.

2 There now -- there may be allegations of fraud. But,
3 your Honor, if you allow a few protesters to bring up
4 allegations of any nature, and then members of the City Council
5 to demand an independent investigation, there will never be an
6 abortion clinic open in the United States of America because
7 there will always be allegations around them.

8 That is why Gemini was used and not Planned
9 Parenthood, because of objections and intimidation and
10 harassment in legal proceedings.

11 It should be irrelevant. It should be treated like
12 any other medical provider, and that's how it was treated.

13 If you look at the minutes of the November 16, 2006,
14 City Council, they complimented what the facility looked like.
15 They thought it was a nice development. They thought it was
16 conveniently located. They thought it would make sense.

17 They wanted to know who the client was. And the
18 answer was absolutely honest: We're in negotiations with a
19 client. We don't have a lease yet.

20 There is nothing fraudulent about --

21 THE COURT: That's a misstatement. It was: "We're
22 in negotiations with a tenant. We do not currently have a
23 lease, but we will want to move ahead."

24 What occurred here -- the question is simple: "Is
25 this building being built specifically for a client?"

1 The answer is an obfuscation.

2 MR. WILSON: Correct, your Honor. And there is
3 nothing in the Zoning Code --

4 THE COURT: A lawyer would say: "Not responsive to
5 the question."

6 MR. WILSON: If it was important to them, they would
7 have followed up.

8 The real concern here, your Honor, is if it's
9 important because we provide abortion services, that's
10 constitutionally impermissible.

11 But we wouldn't be here today, your Honor -- I think
12 everyone recognizes that -- and all these people wouldn't be
13 here today if this was a footcare clinic.

14 If they had said: "Oh, we're opening Dr. Scholl's
15 Footcare Clinic September 18th," and that -- those same points
16 were in the record, would this really be happening?

17 We are getting special treatment. We are getting
18 discriminatory treatment because of the services we provide.

19 What should happen, your Honor, is we should be
20 allowed to open. They gave us a permit, and they pulled it.

21 And let me read something -- and this is very
22 important -- from their briefs. This is from page 7 of the
23 response briefs, which says: "Aurora has indicated that it
24 would not allow plaintiffs to use their facility as an abortion
25 clinic."

1 We could use it for any other purposes. We could
2 open up any other operation there consistent with the Zoning
3 Code.

4 We are being denied the opportunity to open as an
5 abortion clinic. That is constitutionally impermissible, and
6 that is what this case is all about today, your Honor.

7 If there is a citation, like any business that is
8 operated, if there is something wrong in the process, they can
9 come to us then.

10 They have the authority to go and investigate anybody
11 in the City of Aurora. Actually, they are not doing that. I'm
12 sure there are plenty of developers who came in under different
13 names, who used strawmen, who bought property under different
14 names.

15 That, as counsel admitted, is a very common real
16 estate tactic. There is nothing -- in fact, when we said: "We
17 are in negotiations with a tenant," there was no: "Well, we
18 need to know, we can't go further until we know who the tenant
19 is."

20 They took that as it should have been, at face value,
21 because it wasn't important. It isn't the core part of this
22 case.

23 The core part of this case is medical health
24 facilities. Did we comply with medical -- the law about
25 medical health facilities?

1 And the evidence that we did is they issued the
2 temporary occupancy permit.

3 It's the fact that when they found out the type of
4 services we provide, that they went back and started getting
5 out the tweezers and the microscope and figuring out whether
6 there was any way they could block this.

7 There isn't.

8 We have done nothing wrong, we have complied with all
9 of the laws, and we want to start providing medical service to
10 the people of the City of Aurora.

11 And it's simply unfair the way we are being treated
12 today, your Honor. And we have to come before this Court to
13 get the relief we are seeking.

14 And, finally, if I could go back to those e-mails
15 they made a point about?

16 I certainly don't want to be accused of misreading
17 something to the Court. And what I took this to mean is not
18 relevant.

19 We should just read what's in the record, which is,
20 the first email in the record, which is the first e-mail. This
21 is from Alderman Beykirch of the Eighth Ward. B-e-y-k-i-r-c-h.
22 Ward 8.

23 "If Planned Parenthood would have been up front with
24 the City, we could have done a much better job of helping them
25 locate. As it is, based on their admitted deceit, they will be

1 located" -- I think it should be "next" -- "to the major
2 grocery and video store in the area.

3 "We will have to parade our children past protests
4 and face the fact daily that lives are being aborted in that
5 building.

6 "I do not pass judgment on supporters of PP, but I
7 will tell you they are a deceitful organization, and I am angry
8 that they are located where they did without ever consulting
9 anyone in our government."

10 Planned Parenthood doesn't have to consult the City
11 of Aurora about its business.

12 It has to provide answers to the questions that they
13 ask. But they don't -- there is not a special requirement for
14 them to disclose the type of medical services they provide.
15 That would be unconstitutional.

16 This is evidence of animus. This alderman is angry.
17 He considers Planned Parenthood deceitful. He does not like
18 Planned Parenthood.

19 If a federal judge took those positions, your Honor,
20 that would be unacceptable.

21 It is unacceptable in a member of the City of Aurora
22 Council who is judging whether or not we get a permit.

23 We have a permit. We should be allowed to operate.

24 It is simply unfair to block access to all the
25 healthcare we want to provide.

1 . People are being irreparably harmed by not being able
2 to see the doctors and nurses that are on our administrative
3 staff.

4 The balance of the hardships tips decidedly towards
5 us. There really isn't any argument that the Zoning Code, on
6 the one hand, and all of the patients and doctors and the
7 facilities that we provide, are much more important to the
8 people of Aurora right now.

9 And, finally, the public interest is in not denying
10 constitutional rights. The public interest is in not denying
11 medical care. The public interest is in not seeing that
12 patients are treated.

13 The important thing today, your Honor, is that we are
14 here under 1983 to get an injunction, to stop all of these
15 games. To stop references to the state prosecutor. To stop an
16 endless administrative review, and to start letting us treat
17 patients.

18 We ask that you enter the injunction, and allow us to
19 begin providing services.

20 Thank you.

21 THE COURT: Would you like to say a few words,
22 counsel?

23 MR. MALINA: Very brief, if you will let me.

24 One thing I'd like to point out is the Kane County
25 State's Attorney, as you well know, Judge, is not just a

1 criminal prosecutor.

2 THE COURT: That's correct. They have a civil
3 division obviously.

4 MR. MALINA: Right, right.

5 And the other thing I wanted to clarify is that when
6 Planned Parenthood comes before you today, they are arguing
7 under equitable principles that they need a preliminary
8 injunction, extraordinary injunctive relief.

9 And the reason for that, the reason they are in the
10 position they are in regarding the delay, is precisely because
11 they misled or may have misled the City, and they come into
12 this proceeding with unclean hands.

13 That's all I have.

14 THE COURT: All right. What is before the Court is a
15 preliminary injunction. And the factors that the Court must
16 take into account in deciding such a motion include: that the
17 movant, the party, has demonstrated a reasonable likelihood of
18 success on the merits, no adequate remedy at law, and
19 irreparable harm if preliminary relief is denied.

20 If the moving party clears these hurdles, the Court
21 must then consider irreparable harm the non-moving party will
22 suffer if the injunction is granted, balanced against
23 irreparable harm the moving party will suffer if the injunction
24 is denied.

25 And also the Court must consider the public

1 interests, which includes the rights of third parties.

2 These are the standards that counsel agree apply with
3 respect to a preliminary injunction.

4 Now, as Planned Parenthood-Gemini have argued and
5 have pleaded in the very brief complaint in this case, this is
6 brought as a 1983 action against the corporate defendant. No
7 individuals are named as defendants in this case.

8 And the case law makes it clear that a local
9 governmental -- a local governmental unit is subject to suit
10 under 42 United States Code 1983 because it is deemed a person
11 within the meaning of that provision.

12 And this statement comes from Monell versus
13 Department of Social Services, 436 U.S. 658, a 1978 decision.

14 In that regard, municipalities are answerable only
15 for their own decisions and policies. They are not vicariously
16 liable for the constitutional torts of their agents.

17 Rather, it is when execution of a government's policy
18 or custom, whether made by its lawmakers or by those whose
19 edicts or acts may fairly be said to represent official policy,
20 inflicts the injury that the government, as an entity, is
21 responsible for under 1983.

22 And the case law has identified three instances in
23 which a municipality can be said to have violated the civil
24 rights of a person because of its policy:

25 One, an express policy that, when enforced, causes a

1 constitutional deprivation.

2 No policy is alleged in this complaint.

3 Also, a widespread practice that, although not
4 authorized by written law or express municipal policy, is so
5 permanent and well-settled as to constitute a custom or usage
6 with the force of law.

7 And third would be an allegation that the
8 constitutional injury was caused by a person with final
9 policy-making authority.

10 There is no allegation within the complaint that a
11 person with final policy-making authority has violated the
12 rights of the plaintiffs in this case. That presents a serious
13 difficulty for the plaintiff in terms of municipal liability
14 under 1983, as pleaded in the present form of the complaint.

15 Additionally, this action is brought under 1983 with
16 the constitutional deprivation being one of denial of equal
17 protection of law.

18 In that regard, Planned Parenthood in its papers and
19 argument of counsel take the position that they were treated
20 differently than any other health facility in the City of
21 Aurora.

22 But there is no specific reference in the complaint
23 or in the submissions to any person or entity similarly
24 situated.

25 Counsel has referred to several medical facilities in

1 the area. No developer is mentioned specifically. And there
2 are numerous cases in the Seventh Circuit that deal with the
3 issue, for purposes of equal protection of law, that there is
4 an obligation to point to others specifically, who are
5 similarly situated, who were treated differently from the
6 constitutional viewpoint.

7 And in the Village of Winthrop Harbor case, in part
8 the developers requested different variances than the current
9 prospective developers requested, and submitted their plats
10 during different time periods, had their plat requests granted
11 by different and previous boards.

12 There is absolutely nothing in the record to indicate
13 with respect to these other medical facilities or entities what
14 procedures they followed in making their applications for
15 occupancy permits. There is no indication of whether any of
16 those entities that are mentioned within the complaint went
17 before the same Board or the same Committee, in this case.

18 There is no indication how long ago it was, what the
19 administration was, who the mayor was, and what they may have
20 been subjected to along the way.

21 It is speculation, at the moment. It may well have
22 been -- and certainly there is no evidence before the Court
23 from which an inference could be drawn -- but it may well have
24 been they encountered delays and even greater delays as they
25 appeared before the various zoning committees and other

1 departments within the City of Aurora.

2 But a part of what the plaintiff must show is who
3 these other persons or parties were, and the case law refers to
4 them as "comparators."

5 And so with whom does Planned Parenthood compare
6 itself? And with whom does Gemini Development compare itself?

7 It is correct and not disputed that Gemini is an
8 affiliate of Planned Parenthood.

9 But no developers are named within the complaint to
10 suggest that developers have been treated differently from
11 Gemini in the application process.

12 Which developers? When and by whom? And under what
13 factual circumstances? We are left to wonder.

14 And in the case to which I have referred there is a
15 reference: "In order to succeed the persons must demonstrate
16 that they were treated differently than someone who is prima
17 facie identical in all relevant respects."

18 Since these entities are hardly identified, certainly
19 there is nothing -- not even prima facie -- to show that they
20 are identical in all relevant respects.

21 No -- as I have said, no developer is mentioned by
22 name. How they can be the same as Gemini, one is left to
23 wonder.

24 In the case to which I have referred, the Court
25 states that the persons rely on comparisons with three other

1 developments in the village to support their assertion that
2 other similarly situated individuals were treated more
3 favorably.

4 The allegedly comparable individuals, however, are
5 not identically situated in all relevant respects, rationally
6 related to the government's mission.

7 Additionally, there is a reference in many of these
8 cases to a class of one. And I think that Mr. Wilson brings
9 this as a class of one, because it is not brought on behalf of
10 anyone other than Gemini and Planned Parenthood.

11 So the Court views it as a class of one.

12 And in a major case coming out of the Seventh Circuit
13 which worked its way to the Supreme Court of the United States,
14 the Court does recognize there can be a class of one for
15 allegations of unequal treatment under the law.

16 "The number of individuals in a class is immaterial
17 for equal protection analysis. To succeed on their
18 class-of-one claim" -- referring to the other case -- "the
19 persons must demonstrate that they have been intentionally
20 treated differently from others similarly situated, and that
21 there is no rational basis for the difference in treatment."

22 That is what that case says.

23 There are numerous other cases that deal with this
24 fundamental concept, and one of which is McDonald versus the
25 Village of Winnetka:

1 "The purpose of entertaining a class-of-one equal
2 protection claim is not to constitutionalize all tort law nor
3 to transform every claim for improper provision of municipal
4 services, or for improper conduct of an investigation in
5 connection with them into a federal case."

6 And in this case, the McDonald case, again, the issue
7 was that McDonald, in invoking the Constitution has failed to
8 identify someone similarly situated but treated differently.

9 It is not merely an identification. It is not enough
10 to say "Every other health facility in the City was treated
11 differently." That mere assertion does not -- is not enough to
12 support an argument in favor of unequal treatment under the
13 law.

14 And in other cases the Court takes the position --
15 the inquiry, in terms of unequal treatment from a
16 constitutional standpoint, the inquiry that seeks to determine
17 whether there are enough common features between the
18 individuals to allow a meaningful comparison.

19 There is nothing before the Court that would allow a
20 meaningful comparison.

21 The inquiry simply asks whether there are sufficient
22 commonalities on the key variables between the plaintiff and
23 the would-be comparator to allow the type of comparison that,
24 taken together with the other prima facie evidence, would allow
25 one to reach an inference of discrimination.